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THE VERY IDEA OF "LAW AND LITERATURE"

John D. Ayer*

THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION. By *Richard Weisberg*. New Haven: Yale University Press. 1984. Pp. xvi, 218. \$20.

To speak, to teach, to write about "law and literature" inflicts a peculiar frustration. For I know of no way to address the topic that does not seem to concede away what seems to me the central premise. That is: the very *idea* of "law and literature" seems to concede that there are in fact two separate "disciplines." In the mind of the ordinary lawyer or law teacher, this proposition is bound to appear unproblematic: it seems bound to conjure up a picture that is familiar, fairly precise, plausible but, I think, highly misleading and ultimately wrong.

More specifically: for a long time¹ there have been any number of lawyers who have been willing to adorn the profession, and themselves, with the trappings of the literary life. At least until recently, these efforts have been carried on certain fairly well defined metaphysical presuppositions which (at least until recently) weren't very controversial. The idea was that "law" and "literature" were two separate realms of being, companion duchies in the sovereign universe of thought. A lawyer might sojourn in the realm of literature just as he might take a vacation in Paris, carrying back a few good stories and the edifying conviction that he had somehow bettered himself. But it never really struck him that literature had anything important to do with his life. When all was said and done, law was one thing and literature another.² Literature occupied (to modify the conceit) a place in his life more or less analogous to the Daumier drawings in his

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1. It is conventional to lay the blame at the feet of Professor Wigmore. See generally Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574 (1908); cf. Wigmore, *A List of One Hundred Legal Novels*, 17 ILL. L. REV. 26 (1922); Weisberg, *Wigmore's "Legal Novels" Revisited: New Resources for the Expansive Lawyer*, 71 NW. U. L. REV. 17 (1976); Weisberg & Kretschman, *Wigmore's "Legal Novels" Expanded: A Collaborative Effort*, 7 MD. L.F. 94 (1977). For the full trajectory of change in law and literature, see Suretsky, *Search for a Theory: An Annotated Bibliography of the Relation of Law to Literature and the Humanities*, 32 RUTGERS L. REV. 727 (1979); Papke, *Law and Literature: A Comment and Bibliography of Secondary Works*, 73 L. LIBR. J. 421 (1980).

2. See, e.g., A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1978); G. SANTAYANA, *THE GENTEEL TRADITION AT BAY* (1931).

anteroom.³

Taking the long view, this is by no means an inevitable characterization of things. The place of "culture" in society — whether central or peripheral — is an ancient question in intellectual history.⁴ Closer to home, Robert Ferguson has shown that at an earlier time in our own history law and literature "enjoyed" (if that is the right word) a far more intimate relationship.⁵

In any event, it seems pretty clear that the familiar attitude is beginning to change. While it has not yet achieved the dignity of a label, there is a new generation of scholarship that claims an important place for literature in the intellectual life of the law. Richard Weisberg, author of the work under review here, describes it as a "belief that works of literary art and criticism again may structure discussions of fundamental legal issues."⁶

Probably the most conspicuous aspect of this new body of material falls under the heading of "interpretation." Studies in this field recognize that there are fundamental similarities between the problem of interpretation in literature and the problem of interpretation in law.⁷ The new law scholarship mirrors an explosion of scholarship in a larger arena, where "interpretation" is a volatile ingredient in almost everyone's critical arsenal.⁸ The scholarly debris would have landed on us in any event. But given the law's tendency to pick up scholarly baubles from any source, it is all the more inevitable that law scholarship would find fragments to its liking here.

I want to call attention to another aspect of this new vogue for literary studies in law — an aspect which overlaps with the new taste for "interpretation," but which differs from it in an interesting way. I have in mind a number of studies that focus not merely on the tactics of storytelling, but on the situation of the teller. If the "interpretative" studies can be thought of as a kind of epistemology or social theory,

3. The Daumiers have always been a puzzle. It seems inevitable that if the lawyers had ever given a moment's thought to the content of the pictures, they would have taken them down.

4. To take just a single instance, it is, for example, central to W. JAEGER, *PAIDEIA: THE IDEALS OF GREEK CULTURE* (G. Highet trans. 2d ed. 1945).

5. R. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984); see also Page, *The Place of Law and Literature*, 39 VAND. L. REV. 391, 395-402 (1986).

6. Weisberg, *More Words on The Failure of the Word: A Response to Heinzelman and Levinson*, 7 CARDOZO L. REV. 473, 486 (1986).

7. *Interpretation Symposium: Hermeneutics and Legal Interpretation*, 58 S. CAL. L. REV. 35 (1985); cf. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527 (1982), and the many replies, rebuttals, and rejoinders thereto.

8. One hardly knows where to begin. In general, of course, one can point to Derrida, Gadamar, Habermas and Foucault. See generally Bell, *The Turn to Interpretations: An Introduction*, 51 PARTISAN REV. 215 (1984); *THE POLITICS OF INTERPRETATION* (W. Mitchell ed. 1983).

the studies I have in mind are almost better thought of as a subset of ethics.

The studies I have in mind are based on a decisive premise about what it is to be a person. The conviction is that in an important sense, we *are* what we *imagine ourselves to be*. There is no necessary solipsism here: these studies do not suggest that we can "imagine" ourselves to good health or eternal life. What they do hold is that our concept of ourself counts for far more, and stark physical facts far less, than is sometimes thought to be the case. The scholarly project, then, becomes the task of trying to understand the provenance, and to explore the implications, of this view. How do we create, negotiate, identify, these imaginative worlds in which we live? What are the implications of different imaginative choices? How do they enrich, and how impoverish, our lives and the lives of others?

One can list any number of antecedents for this view. Insofar as this view makes ethics a matter of reflective choice, it is probably pretty good Aristotle.⁹ Insofar as it emphasizes the richness and particularity of individual experience, it is part of a tradition associated with Hegel.¹⁰ Closer to home, probably the most important parallel is in the work of the philosopher Alasdair MacIntyre,¹¹ alone and together with the theologian Stanley Hauerwas.¹² More self-consciously than anyone else, MacIntyre and Hauerwas have tried to foster what surely is (at least for our time) a new way of doing moral philosophy.¹³

9. ARISTOTLE, *ETHICS* (H. Tredennick rev. ed. 1976); ARISTOTLE, *THE POLITICS* (T. Saundeis rev. ed. 1981). That would be Aristotle as distinct from Kant. See generally H. ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* (1982); R. BEINER, *POLITICAL JUDGMENT* (1983).

10. Again, Hegel as distinct from Kant. On Hegel, see G. HEGEL, *PHENOMENOLOGY OF SPIRIT* §§ AA, BB, CC, at 139-478 (A.V. Miller trans. 1977); G. HEGEL, *PHILOSOPHY OF RIGHT* §§ 142-57 (T.M. Knox trans. 1945). On Kant, see generally I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 26-28 (L. Beck trans. 1959). For a criticism of Kant's abstraction of morality from contingent fact, see A. MACINTYRE, *AFTER VIRTUE* 42-45 (1981).

11. A. MACINTYRE, *supra* note 10; A. MACINTYRE, *A SHORT HISTORY OF ETHICS* (1966). The commentary on MacIntyre, while not overwhelming, is extensive. See, e.g., Wartofsky, *Virtue Lost or Understanding MacIntyre*, 27 *INQUIRY* 235 (1984); MacIntyre, *After Virtue and Marxism: A Response to Wartofsky*, 27 *INQUIRY* 251 (1984); O'Neill, *Kant after Virtue*, 26 *INQUIRY* 387 (1983); Gaita, *Virtue, Human Good, and the Unity of Life*, 26 *INQUIRY* 407 (1983); MacIntyre, *Moral Rationality, Tradition, and Aristotle: A Reply to Onora O'Neill, Raimond Gaita, and Stephen R.L. Clark*, 26 *INQUIRY* 447 (1983). MacIntyre's work appears to provide a conceptual framework for an important recent study of popular attitudes to ethical questions. See R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

12. For a sampling of Hauerwas' work see S. HAUERWAS, *A COMMUNITY OF CHARACTER* (1981); S. HAUERWAS, *VISION AND VIRTUE* (1981); see also S. HAUERWAS, *CHARACTER AND THE CHRISTIAN LIFE: A STUDY IN THEOLOGICAL ETHICS* (1975). For Hauerwas and MacIntyre together, see *REVISIONS* (S. Hauerwas & A. MacIntyre eds. 1983).

13. A commentary says that MacIntyre and his ilk "have started afresh by taking a very old approach." R. KRUSCHWITZ & R. ROBERTS, *THE VIRTUES: CONTEMPORARY ESSAYS ON MORAL CHARACTER* 2 (1987). The restoration of "virtue" to philosophical dialogue is generally said to begin with Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1 (1958); I. MURDOCH, *The Sovereignty of Good over Other Concepts*, in *THE SOVEREIGNTY OF GOOD* 77 (1970); Foot,

And while their work may not be directly related to all the interesting recent work in law, still I think they make explicit a number of the more interesting implications of this new approach. In a departure from so much recent moral philosophy, "[t]hey are asking less about the nature and foundations of moral *rules* and *language*, and more about the nature and traits of the moral *person*."¹⁴

In law itself, I think the progenitor of this approach must be James Boyd White of the University of Michigan, whose coursebook, *The Legal Imagination*, published in 1973, remains one of the landmarks of modern legal education.¹⁵ It is not easy to situate White exactly. While he has not gone unnoticed,¹⁶ he can hardly be said to have "founded a school," or to have created a distinctive tradition. Perhaps this is simply a comment on the merits of his work. I would rather think, however, that it is more a testimony to White's distinctiveness than to the intrinsic content of his work.¹⁷

A parallel line of inquiry emerges in the work of Thomas L. Shaffer, now at Washington and Lee. Shaffer's intellectual biography is instructive. His "hard law" field is the law of wills and trusts.¹⁸ He has expanded from there into the field of lawyer-client counseling,¹⁹ and from there into what may be lamely described as more general

Moral Beliefs, 59 PROC. ARISTOTELIAN SOC. 83 (1958-1959); Frankena, *The Ethics of Love Conceived as an Ethics of Virtue*, 1 J. RELIGIOUS ETHICS 21 (1973); see also Frankena, *Prichard and the Ethics of Virtue*, Notes On a Footnote, 54 MONIST 1 (1970). For a brief adverse criticism of this tradition, see Loudon, *On Some Vices of Virtue Ethics*, 21 AM. PHIL. Q. 227 (1984).

14. R. KRUSCHWITZ & R. ROBERTS, *supra* note 13, at 2.

15. J.B. WHITE, *THE LEGAL IMAGINATION* (1973); see also J.B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); J.B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); cf. White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 36 J. LEGAL EDUC. 155 (1986); White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984) (reprinted in 5 MISS. C. L. REV. 25 (1984)); White, *Law as Language: Reading Law and Reading Literature*, 60 TEXAS L. REV. 415 (1982); White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

16. For commentary on *The Legal Imagination*, see Eisele, *The Legal Imagination and Language: A Philosophical Criticism*, 47 U. COLO. L. REV. 363 (1976); Ball, Book Review, 44 U. CHI. L. REV. 681 (1977); Fuller, Book Review, 63 GEO. L.J. 289 (1974); Vinson, Book Review, 2 FLA. ST. U. L. REV. 827 (1974); Weisberg, Book Review, 74 COLUM. L. REV. 327 (1974); White, Book Review, 60 VA. L. REV. 374 (1974); Wolf, Book Review, 26 SANTA CLARA L. REV. 519 (1986). On *When Words Lose Their Meaning*, see Ayer, *Law, Literature and the "Conversation of Mankind"*, 4 CARDOZO ARTS & ENT. L.J. 261 (1985); Page, *The Place of Law and Literature*, 39 VAND. L. REV. 391 (1986); Hutchinson, *From Cultural Construction to Historical Deconstruction* (Book Review), 94 YALE L.J. 209 (1984); O'Fallon, Book Review, 3 CONST. COMM. 204 (1986); Papke, *Neo-Marxists, Nietzscheans, and New Critics: The Voices of the Contemporary Law and Literature Discourse* (Book Review), 1985 AM B. FOUND. RES. J. 883 (1985); Teachout, *Worlds Beyond Theory: Toward the Expression of An Integrative Ethic for Self and Culture* (Book Review), 83 MICH. L. REV. 849 (1985); see also Weisberg, *A Response to Fish and White*, 5 MISS. C. L. REV. 57 (1984).

17. White himself is liberal in acknowledging influences from his teachers. See J.B. WHITE, *THE LEGAL IMAGINATION*, *supra* note 15, at xxv-xxvi.

18. See T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* (2d ed. 1979).

19. See T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976).

"interpersonal relations."²⁰ Framing all of these, however, have been a number of essays attempting to address some larger questions of the lawyer's life.²¹ At least in this more "general" work, Shaffer puts his case explicitly in terms of the tradition of Christian doctrine. Shaffer clearly regards his Christianity as central to his case. I am not sure that it need be. In any event, I suspect that among academics this approach may have served to obscure some of Shaffer's virtues, and thus to limit his audience.²²

Beyond White and Shaffer, I suppose there are any number of persons who should be "counted" in this endeavor; there is surely always a problem of drawing a line.²³ For present purposes, I should like to recognize just two young scholars who seem to me to have greatly expanded our understanding of the ways in which we imagine ourselves to be. One is Gerald López of Stanford, whose essay *Lay Lawyering*²⁴ takes a simple but elegant premise and expands it into a major study of the technique of argumentation. López tells the story²⁵ of the young man trying to talk his way into the services of a taxicab on a busy evening. He surveys the range of argumentative techniques available to his protagonist, and tries to demonstrate that there is no significant discontinuity between the "lay lawyering" of his title and lawyering in the law.

Another body of work that deserves equal billing is that of Robin West. West's premises, like López', are simplicity itself. They sound almost like undergraduate term paper assignments: "apply Northrop Frye's theory of literature to some legal thinkers such as Ronald

20. See T. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* (1977).

21. See T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981); Shaffer, *A Lesson from Trollope for Counselors at Law*, 35 WASH. & LEE L. REV. 727 (1978); Shaffer, *Henry Knox and the Moral Theology of Law Firms*, 38 WASH. & LEE L. REV. 347 (1981); Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981); Shaffer, *Moral Implications and Effects of Legal Education Or: Brother Justinian Goes to Law School*, 34 J. LEGAL EDUC. 190 (1984); Shaffer, *The Gentleman in Professional Ethics*, 10 QUEEN'S L.J. 1 (1984).

22. I suppose that in other circles it may have broadened his audience.

23. Some of this perspective appears in, and is hard to isolate from, the literature of interpretation. See notes 7-8 *supra* and accompanying text. See also M. BALL, *THE PROMISE OF AMERICAN LAW* (1981); R. COVER, *JUSTICE ACCUSED* (1975); J. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976); Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). From another perspective, some of this same thinking has surfaced in the literature on professional responsibility. See, e.g., G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY* (1981); E. DVORKIN, J. HIMMELSTEIN & H. LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981).

24. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984). López' attitude is also reflected in the current edition of the Mueller contracts casebook. See A. MUELLER, A. ROSETT & G. LÓPEZ, *CONTRACT LAW AND ITS APPLICATION* (3d ed. 1983).

25. I use the term advisedly: the idea of "story-telling" is central to López' work. Seymour Chatman notes that "[t]he study of narrative has become so popular that the French have honored it with a term — *la narratologie*." Chatman, *What Novels Can Do That Films Can't (and Vice-Versa)*, in *ON NARRATIVE* 117, 117 (W. Mitchell ed. 1981).

Dworkin";²⁶ "compare Franz Kafka with Richard Posner";²⁷ "compare Freud with legal liberalism."²⁸ Simple, of course, in retrospect: the fact is, she is opening up a whole new channel of dialogue.

Richard Weisberg bids fair to claim, if he has not already taken, a place for himself in this endeavor. With *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*,²⁹ he has brought together a number of essays that operate on the premises and pursue the themes that I have tried to identify above. Weisberg utilizes for his inquiry the text of eight works by four modern authors.³⁰ Weisberg's particular thesis appears to be that, whether or not the spirit giveth life, the letter certainly killeth³¹ — in his words, "narrative acts lead to passivity in the face of clear injustice or, worse still, to the creation of injustice itself" (p. 178). Language, so central at once to literature and the law, turns out to be the villain of the piece. Weisberg does suggest, a few lines before the end of his book, that "the use of words in the service of positive values remains, for these authors a magnificent possibility" (p. 178). But it's clear that his heart isn't in it, and word-bashing remains as the dominant, even the pervasive, theme.

Although these articles are drawn from a variety of sources,³²

26. See West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985); cf. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 451 (1974) ("[A]s a matter of literary genre (though most likely not as a matter of literary influence) the closest analogue to *Economic Analysis of Law* is the picaresque novel.").

27. See West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

28. See West, *Law, Rights, and other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986).

29. Weisberg has received lavish praise in two separate reviews published by journals at his own school. See Kornstein, *The Success of the Word: The Literary Critic as Constitutional Theorist*, 4 CARDOZO ARTS & ENT. L.J. 277 (1985); Heinzelman & Levinson, *Words and Wordiness: Reflections on Richard Weisberg's The Failure of the Word* (Book Review), 7 CARDOZO L. REV. 453 (1986); cf. Weisberg, *supra* note 6. See also Allen, Book Review, 4 LAW & HUMANITIES INST. MEDIATOR 2 (1985); Baughman, Book Review, 9 LEGAL STUD. F. 231 (1985); Page, Book Review, 39 VAND. L. REV. 391 (1986); Ramke, Book Review, 19 GA. L. REV. 221 (1984); A. Simpson, Book Review, Times Literary Supp., Mar. 29, 1985, at 342, col. 3. For some of Weisberg's more recent work, see Weisberg, *The Quest for Silence: Faulkner's Lawyer in a Comparative Setting*, 4 MISS. C. L. REV. 193 (1984).

30. Three by Dostoevski: *Notes from Underground*, *Crime and Punishment* and *The Brothers Karamazov*; two by Flaubert: *Salammbô* and *L'Education Sentimentale*; two by Camus: *The Stranger* and *The Fall*; and one by Melville: *Billy Budd*.

31. "In law as in Religion, the letter kills, the spirit makes alive." Brief for Defendant at 21, *Rutgers v. Waddington*, N.Y. Mayor's Ct. (1784), removed by writ of error, N.Y. Sup. Ct. (1784-1785), quoted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, DOCUMENTS AND COMMENTARY 391 (J. Goebel ed. 1964).

32. Weisberg credits *American Imago*, *Columbia Law Review*, *Modern Fiction Studies*, *New York University Law Review*, *Northwestern Law Review*, and *Rutgers Law Review*, as well as an article he co-authored with Barricelli, which is Weisberg & Barricelli, *Literature and Law*, in INTERRELATIONS OF LITERATURE 150 (1982).

Weisberg is explicit in presenting them as a unified whole. He builds much of his argument around Nietzsche's notion of *ressentiment*,³³ which he defines (aptly enough) as "perpetual rancor" (p. xiii). The "familiar markings of resentment" are, in this view "unresolvable envy, the victimizing of irrelevant objects, the consistent urge for futile gesturing, and, most important, the tendency to verbalize rather than to act."³⁴ He explains:

As a chronic condition of lingering, unwanted dependence upon a person or situation somehow seen as insulting, resentment finds fertile ground among reactive types with no firm sense of personal values. Envious of the graceful and harmonious existence of just individuals around him, the man of resentment at his most creative uses his gifts of pervasive observation and complex intellect to insinuate himself into power.³⁵

In this context, Weisberg tries to show that all of his "protagonists"³⁶ share the same *ressentiment* affliction. And he tries to show, or at least he asserts,³⁷ that this *ressentiment* is a peculiarly lawyerly vice.

But for all its asserted coherence, the book has the distinct appearance of being cobbled together. Note: "the protagonist as lawyer," not "the lawyer as protagonist." For starters, Weisberg has to deal with the embarrassment that many of the objects of his scrutiny are not lawyers even in the broadest sense of the term. Camus' Clamence may be "the modern novel's quintessential lawyer," as Weisberg asserts,³⁸ although if you want to get picky you would stress that he is more of an ex-lawyer. Dostoevski's Raskolnikov and Flaubert's Fre-

33. See F. NIETZSCHE, *THE GENEALOGY OF MORALS* 185-86 (F. Golfing, trans. 1956); F. NIETZSCHE, *BEYOND GOOD AND EVIL* 59-60 (aphorism 52) (M. Cowan trans. 1966). These references are to the translations used by Weisberg. See P. 183 nn.3-4. See generally pp. 13-41.

34. P. 95 (from a discussion of *Salammbô*).

35. P. 14. It seems to me that Weisberg has difficulty showing *ressentiment* to be peculiarly modern. He says:

One of the oldest literary paradigms, that of insult and revenge, structures all of these highly modern texts. But, beginning with *Notes from Underground*, the "insult" has been reduced to a figment of the protagonist's overheated verbal imagination. Harking back to Hamlet, but lacking the need for vengeance revealed to that protagonist, these seminal characters use words not only to avoid disturbing realities but also to create them.

P. xi. So we can infer that the anger of Achilles, for example, was *not* the result of "the protagonist's overheated imagination." And we must infer that Hamlet's "need for vengeance" is somehow morally attributable to later heroes. But elsewhere he calls Hamlet "that first great literary lawyer." P. 8.

36. But see text at notes 48-53 *infra*.

37. See text at notes 38-43 *infra*.

38. P. 147. But maybe not. I suppose I would be willing to concede that the heroes of Louis Auchincloss and Robert Travers are terminally middlebrow. But can the same be said for Abner Coates in James Gould Cozzens' *The Just and The Unjust* (1942): Zechariah Chaffee, Jr., called it "the best account I know of the daily life of the ordinary lawyer." Chaffee, Book Review, 56 HARV. L. REV. 833, 833 (1943). Doing research for *The Just and the Unjust* Cozzens said:

I can't understand why it did not attract my attention before — it is such an extraordinary compound of baseness and high-mindedness, from one to the other and back again without a change of tone or turn of color. . . . There is, I suppose something about it close to what I would have to admit was my own feeling about life — it is absurd to pretend that there is

deric Moreau may fit, if you can believe that a law *student* is a lawyer.³⁹ Characters like Porfiry Petrovich in *Crime and Punishment*,⁴⁰ Ippolit Kirillovich in *The Brothers Karamazov*,⁴¹ and the inquisitor in *The Stranger*⁴² may count, if you will accept as a "lawyer" the investigator/prosecutors of the European inquisitorial tradition.⁴³

Beyond that, the going gets tougher. Some would have thought that *Billy Budd's* Captain Vere was a sailor, not a lawyer. Not quite; Weisberg says he is "as lawyerlike a naval officer as one finds in literature."⁴⁴ That still leaves Doestoevski's *Underground Man*,⁴⁵ and the whole assemblage of Carthaginians in *Salammbô*⁴⁶ who, at least in formal terms, have not even the most tenuous relationship with the profession.

In fact, Weisberg pretty quickly boots the notion that this is a book about lawyers, per se. Before he is out of the preface, he has supplanted the crime of being a lawyer with the more general vice of "legalism": these are "the legalistic protagonists" (p. xiii), later to

any plan or meaning in it, but never mind, we will make a plan and the meaning will be that we are men and not dogs.

Quoted in M. BRUCCOLLI, JAMES GOULD COZZENS: A LIFE APART 148 (1983). For an appreciative understanding of Cozzens' use of the law, see also F. BRACHER, THE NOVELS OF JAMES GOULD COZZENS (1959). Another recent lawyer's study of Clamence, convergent with Weisberg's, is Martin, *The Lawyer as Friend*, 32 RUTGERS L. REV. 695 (1979).

39. Weisberg asserts that *L'Education Sentimentale* is "given over to lawyers," p. xii, but later he acknowledges that Frédéric Moreau, the hero, had no more than a "flirtation with practice," p. 110, and that Flaubert, "[a] failure at law himself, . . . similarly debilitates his hero." P. 112. An aside: why does Weisberg use French here and English with Camus, particularly considering that "Sentimental Education" is probably a more adequate translation of Flaubert's title than "The Stranger" is of Camus?

40. Weisberg says that *Crime and Punishment* "pits against each other — and the world — the complementary perspectives of a law student and a lawyer." P. xii. That would be Porfiry Petrovich, the investigator, and Raskolnikov, the killer. Weisberg apparently recognizes that the combination strains his structure. He says: "This incursion upon the usual structure of these legalistic texts was never to be repeated by Dostoevski. Never again does the protagonist as lawyer act (however 'wrongly'); he only generates, through language, resentful ideas in others." P. xiii.

41. Also the Grand Inquisitor. Weisberg dismisses the earthly inquisitor, Nikolai Parfe-novich Nelyudov, as "a diminutive, pleasant looking young man." P. 56.

42. Weisberg mentions "the inquisitor (*juge d'instruction*) and the procurator (*procureur*)," but he reserves most of his wrath for the inquisitor. P. 115.

43. Weisberg is explicit on the point. See, e.g., pp. 45-48, 56-64, 115-22.

44. P. 135. Weisberg explains that Vere is "the apparent voice of disinterest, reason, and formality." Elsewhere, he says that *Billy Budd* is the "paradigmatic statement on how acts of judgment are to be rendered, how statutes and precedents are read, and how authoritative communicators deceive through clever speech." P. 147. But he also argues that the "trial" of Billy was a travesty from start to finish. Cf. R. SHERILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1970).

45. "The Underground Man, having failed because of his overly self-conscious stance in every personal relationship he has encountered, attacks, through the medium of words, the essentially nonverbal approach to reality which brings fulfillment to others." P. 6.

46. The foremost lawyer in the case turns out to be Schahabarim who, "faced with the noble appearance and unfettered sensuality of his pupil Salammbô, resentfully fills her ear with provocative notions to lead her astray." P. 6. See generally pp. 85-103.

become "the legalistic male protagonists" (p. 91) or (in *Salammbô*) "the legalistic elders" (p. 99). If there is any doubt on the point, the reader is quickly and specifically disabused of any notion that one needs to be a lawyer in order to be "legalistic." By pages seven and eight, Weisberg is discussing "[L]awyers, or intellectuals using lawyer-like modes of interaction and decision making" (pp. 7-8). Later on the same page it is "the protagonist as lawyer, with or without his *juris doctor*" (p. 8). Or, most generally: "Law, philosophy, history, theology — conspirators in furthering the ascendancy of narrative structures over effective individual action."⁴⁷ As Weisberg says: by the middle of the nineteenth century "[t]he mimetic artist took a step back and began to perceive law and legalistic reasoning all around him" (p. 7). If you define the idea of "lawyer" this broadly, it is no wonder.

If Weisberg stretches the notion of "lawyer," he rather bends the notion of "protagonist." Billy Budd, it appears, is not the "protagonist" of *Billy Budd*; that distinction goes to the "lawyerlike" Captain Vere. Raskolnikov seems to take shared honors with Porfiry in *Crime and Punishment*.⁴⁸ Most puzzling of all, Meursault is clearly identified as "the protagonist" of *The Stranger*;⁴⁹ yet there is no doubt that the inquisitor, not Meursault, fits Weisberg's thesis.⁵⁰

The Underground Man makes the list, but not Billy Budd, not Raskolnikov in *Crime and Punishment*, and not Meursault in *The Stranger*. Indeed, with the notion of protagonist as with the notion of lawyer Weisberg does some explicit waffling. Early on, we are told that we are discussing "wordy protagonists, or evocations of them in less central characters" (p. 3; emphasis added).

This elasticity of definition is distracting, at least. A lesser, but equally distracting, difficulty is that Weisberg, despite a lifetime of experience with language,⁵¹ has a disquieting tendency to drop literary clangers on his foot. Specifically, it never before occurred to me that Frédéric Moreau occupies a "role as a kind of trampoline upon which bounces [sic], in a constant rhythm of appearance and disappearance,

47. Pp. 6-7. In particular, Weisberg makes it clear that he thinks that some of his remarks apply not merely to characters in novels, but to the novelists who created the characters. See, e.g., p. 86 ("progression from priestly mendacity to legalistic mediocrity"); p. 122 ("Lawyer and author understand each other"); p. 171 ("the downfall . . . of the author's verbal mode"). And he also has a special animus for organized religion. See pp. 172-76 and *passim*.

48. Weisberg says that *Crime and Punishment* "pits against each other — and the world — the complementary perspectives of a law student and a lawyer." P. xii.

49. "The protagonist, whose name is Meursault . . ." P. 116; cf. p. 122.

50. See notes 40-43 *supra* and accompanying text. Weisberg seems to have a similar, although more modest, problem with the notion of "modernity." At the beginning, he refers to "modern literature during the years prior to and including the Second World War" (from 1862?). P. 3. Later, he refers to Camus as offering "eminent elaborations of the nineteenth-century novel's great themes of negativity: resentment and legality" (to 1956?). Pp. 114-15.

51. The A.A.L.S. *Directory of Law Teachers* reports that Weisberg has a Ph.D. from Cornell and a J.D. from Columbia. He taught literature at the University of Chicago, and practiced law in New York and Paris, before taking up his present position on the law faculty at Yeshiva.

the events of a historical period" (p. 110). And I am still trying to come to terms with the following:

For the great epic writers like Homer, as for the rare, almost superannuated modern individual, Nelson, heroic action and narrative art were inextricably linked. One arm acted, the other wrote. [p. 17]

What can be the meaning of all this? I trust Weisberg is not trying to tell us that most of our heroes are nearing retirement age. I assume he does not mean that Homer linked Nelson together with heroic action and narrative art. I let pass also the fact that Homer was a blind poet and Nelson a one-armed sailor. I am left with the spectacle of Homer (or Nelson), sword in his left hand and pen in his right, spilling the blood of his enemy while being careful not to spill ink on his trousers. "Bang the field-piece, twang the lyre," as Dickens said.⁵² Or if the skeeters don't get you, then the 'gators will.

A further difficulty is that Weisberg suffers from a moderately severe case of second-degree adjectival logorrhea. He has a near-fatal weakness for the epithet "wordy": anathema to anyone who sees such menace in the word. On the first page of the preface, we are told that in *Salammbô* "wordy characters come to dominate and control warriors and princesses" (p. xi). Two pages later, we are dealing with "the wordy characters' spiritual problems" (p. xiii). By page eight "more recent wordy protagonists" are "faced with a puzzling and unjust world" (p. 8). Schahabarim is a "wordy adversary" (p. 102). Clamence, the quintessential lawyer, not surprisingly has a "wordy philosophy" (p. 128). A double dose is reserved for that great modernist lawyer and protagonist, Thersites of the *Iliad*, who shows "wordy cowardice" (p. 95) as he "wordily advises the Greek heroes."⁵³

"Wordy" is not his only epithet; nor are all his epithets so negative. Indeed, Weisberg can be downright gushy over people and works that meet with his approval. His thesis adviser is "the revered Paul de Man" (p. xv), not to be confused with "the revered, *late* Professor Max Rheinstein" (p. 193; emphasis added). Harold Pinter and Dostoevski do work that is "brilliant."⁵⁴ Sartre undertakes a "mammoth endeavor" (p. 85). Franklin H. Littell is "an exceptionally forthright Christian theologian" (p. 183). René Girard is "a perceptive phenomenologist of the novel" (p. 76). And surely the oddest character in this

52. C. DICKENS, *THE PICKWICK PAPERS* 12 (Illustrated Modern Library ed. 1943).

53. P. 185. For an exchange on Weisberg's view of Thersites, compare Heinzelman & Levinson, *supra* note 29, at 459-62, with Weisberg, *supra* note 6, at 475-77. Weisberg can't let go of an epithet: here, Thersites is "that wordy character." *Id.* at 477.

54. Pp. 39, 40, 183. The reviewers get caught up in the spirit of the occasion. "Weisberg is a brilliant law professor with a fertile and provocative imagination." Kornstein, *supra* note 29, at 297. "His concluding chapters, on *Billy Budd*, are particularly stunning, fully meriting the otherwise hackneyed term 'brilliant.'" Heinzelman & Levinson, *supra* note 29, at 456.

entire *ménage* would be "the eventual 'drop-out' Charles Reich" (p. 142).

Aside from the epithets, a final complication is a more or less relentless penchant for name-dropping. Weisberg seems to operate on the proposition that there is no idea, however modest, that cannot be ennobled if it is draped with the banner of a distinguished mentor, no matter how extraneous to the purpose at hand. Some of these cross-references at least stay within bounds of the material under study: Ivan Karamazov is "[l]ike the Underground Man fleeing from Liza."⁵⁵ But he is also "[l]ike Faust's Mephistopholes" (p. 71); and Ras-kolnikov is "like Kafka's Joseph K." (p. 51). Further afield, "Sartre's postwar philosophy (like Heidegger's prewar *Sein und Zeit*) seems tarnished by his Occupational career comforts" (p. 3). Scheler is "a contemporary of Heidegger" (p. 24), and Nietzsche is seen as "[a]nticipating Sartre."⁵⁶ Reflecting on the realist novel, "one thinks of Henry James" (p. 22), and if we need more help, then "Victor Shklovski reminds us" how to understand a novelistic plot (p. 135). The names come in twos ("St. Petersburg being to Dostoevski what Venice was to Schiller and Mann") (p. 48); threes ("politically active 'romantics' such as Stendhal, Hugo, and Lamartine") (p. 89); fours ("the analyses of Georg Lukacs, Victor Brombert, Jonathan Culler, and myself as well") (p. 85); and fives ("Balzac, Hugo, Tolstoi, Kafka, and, of course, Camus all provocatively incorporated the inquisitor into their narratives as well") (p. 190).

It may be that none of this is central to his argument, though I must say that if ethics is truly a subset of aesthetics,⁵⁷ then I'm not sure I want to trust Weisberg with my checkbook. But let that be. The point of this detailed nitpicking is to raise an issue that seems to me central to the work. That is: for a man who is death on "wordiness," Weisberg shows a passion for, if not always complete control over, words. How, if at all, can we make sense out of such a "wordy" attack on words?

Central as it may be, this question surely is not a novelty. Indeed, it is a staple of a good deal of recent inquiry. Is there any "meaning" to the deconstructionist attack on meaning?⁵⁸ Is there any "truth" to

55. P. 71. One is tempted to wonder whether Liza, for her part, is fleeing from Simon Legree. Cf. H. STOWE, *UNCLE TOM'S CABIN* (K. Lynn ed. 1962) (Jewett ed. 1852).

56. P. 22. He also is seen as "somewhat anticipating John Rawls." P. 36. Indeed, Weisberg finally runs out of steam on this one: "Reading Nietzsche on justice together with Rawls' widely discussed *A Theory of Justice* . . . raises interesting problems better handled in a different forum." P. 189.

57. Weisberg promises to discuss the relation of ethics and aesthetics in a subsequent volume. See p. 179.

58. See, e.g., J. DERRIDA, *MARGINS OF PHILOSOPHY* (A. Bass trans. 1982); J. DERRIDA, *POSITIONS* (A. Bass trans. 1981); J. DERRIDA, *WRITING AND DIFFERENCE* (A. Bass trans. 1978).

the modern philosophic attack on truth?⁵⁹ A question like this may well be answerable, but not unless it is asked. Weisberg doesn't quite ignore the problem, but he comes pretty close. He concedes, peripherally (but no more than peripherally) that there are words and words — good words and bad words, words under control and words out of control, successes of words as well as failures. Thus, on the last page he concedes that it is not language per se that bothers him; only "language systems bereft of ethical referents" (p. 179). Just how to tell the difference is, of course, the problem; and on this we get very little help. Weisberg argues that the distinction has something to do with "complexity." For example, of that quintessential lawyer, Clamence, we are told that his "verbal complexity renders him an easy victim of moral relativism and passivity."⁶⁰ Unfortunately for clarity's sake, it appears that complexity alone is not enough. The complexity of Flaubert's Frédéric Moreau, we are told, is "contrived and, ultimately, legalistic" (p. 110). On the other hand, Lambert Strether, appearing in a cameo role on loan from Henry James' *The Ambassadors*, entertains a complexity that is "romantic — even poetic."⁶¹ Aside from this, the question of what makes a person "legalistic," and therefore monstrous — rather than merely verbal — remains unanswered.⁶²

Words can do harm: it is an important insight, but not, in itself, a new one — and without discrimination, not even very helpful. It puts one in mind of the old story of the sailor who was beating the Jew. Someone asked him why he did it and he said "because the Jews killed Christ." Answer: "Well, even if they did, that was two thousand years ago." Reply: "Well, I just found out about it now." Closer to home, it sounds like law student talk: the first stage on the road to maturity, where the student discovers (and asserts) that "the judge can reach any result he wants" — as if that ever settled anything.

In fairness to Weisberg: Of course he is onto something. Words can do harm, and the ways in which they do may be (at least within limits) identified and described. Nietzsche, with the assistance of Max Scheler,⁶³ helped to isolate this tendency, and to make it part of our

59. See, e.g., R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

60. P. 114. Clamence is further described as having "an essentially passive and overly verbal nature which resists engagement and ends in mendacity." P. 125.

61. P. 110. I don't want to suggest that Weisberg is wrong to contrast Frédéric Moreau and Lambert Strether who, indeed, seem to be rather different characters. Weisberg explains that "Lambert Strether's increasing emotion for Mme de Vionnet enriches his, and through him the reader's, subjective appreciation of everything he sees." P. 110; see also p. 4. Presumably this is meant to set him in contrast to Frédéric, who is as lacking in self-insight at the end of the book as he is in the beginning. But I think there may be a more adequate way of capturing the distinction than with a few offhand remarks about "complexity."

62. Weisberg has a similar problem with the idea of "procedure." While he seems to identify a taste for procedure as a vice akin to "legalism," he himself remains a devoted proceduralist; indeed many of his critiques are built not around the proposition that it is wrong to use a legal procedure, but that the procedure in question was used wrongly.

63. See M. SCHELER, *RESSENTIMENT* (W. Holdheim trans. 1961).

conceptual structure, in his analysis of *ressentiment*. As Weisberg justly observes, a characteristic of *ressentiment* is that the actor learns to spin verbal webs around himself: "Envious of the graceful and harmonious existence of just individuals around him, the man of *ressentiment* at his most creative uses his gifts of pervasive observation and complex intellect to insinuate himself into power" (p. 14). And there can be no doubt that this particular turn of mind is best illustrated with novels — including the novels Weisberg chose to examine.

But taken uncritically this antidote to the poison of language leads Weisberg into some grotesque misunderstandings about particular characters. This may be seen by taking a second look at three victims of "legalistic inquiry" — Raskolnikov, Billy Budd, and Meursault. Their stories offer instructive, if in some sense rather obvious, grounds for comparison and contrast. Weisberg has no trouble recognizing Billy Budd as a victim — a reading probably pretty much in accord with conventional criticism.⁶⁴ He isn't so kind to Raskolnikov, although Raskolnikov's principal crime seems to be that he (unlike Billy?) shows the taint of legal training.⁶⁵ But most puzzling is his treatment of Meursault: Weisberg adores him. Now, Meursault may well have been the victim of an injustice. On the other hand, the enemy of my enemy is not necessarily my friend: Weisberg tumbles into silliness when he tries to idealize him. Weisberg says: "Mitya Karamazov aside, Meursault is the only male character studied here who experiences sensual pleasure, wins the love of a woman, and interacts normally with colleagues and friends."⁶⁶ He might have said that Meursault is the only one who killed an Arab. It may be that he should not hang; but I certainly wouldn't want him for a roommate — nor, I suspect, would Weisberg. Meursault is not a revolutionary, or even a hero: he is an aimless, anomic, amoral alien.⁶⁷

64. Weisberg's notes offer a helpful, if necessarily limited, survey of Melville criticism. See generally the footnotes to Chapters 8 and 9. There is also an interesting interchange over the meaning of *Billy Budd* in *Harpers Magazine* for June and September 1986. See Vizinczey, *Engineers of A Sham*, HARPER'S MAG., June 1986, at 69; *Letters: Billy Budd Died for Whose Sins?*, HARPER'S MAG., Sept. 1986, at 5-6 (a dismissive letter from Weisberg ("Too bad he doesn't know how to read fiction.")). Weisberg offers a somewhat startling novelty, however, in his assertion that it is Claggart ("J.C.") and not Billy who "stands for" Christ in this narrative. Pp. 172-76. He finds Billy "more representative of classical civilization in decline, perhaps at the birth of Christianity." P. 173. Caligula, perhaps?

65. See text at note 39 *supra*.

66. P. 116. Camus doesn't help him on this point. Weisberg quotes the following, with approval, from *The Stranger*: "I'm sure I loved my mother, but that didn't mean anything. *All healthy creatures have more or less desired the death of those they love.*" P. 117 (emphasis added). The remark echoes Shaw's Don Juan: "You may remember that on earth — though of course we never confessed it — the death of anyone we knew, even those we liked best, was always mingled with a certain satisfaction at being finally done with them." G. SHAW, *MAN AND SUPERMAN* 94 (1928). As satire in the mouth of Don Juan, it is perfectly appropriate. As potted philosophy in the mouth of Meursault, it is dreadfully out of place. Meursault, as I argue in the text, is not a revolutionary; he is a victim.

67. In an earlier version, Weisberg offers a somewhat fuller appreciation of Meursault.

Indeed one unifying thread in these three stories is that all three of the characters under discussion — Raskolnikov and Billy Budd, just as much as Meursault — killed people. The legal system that dealt with them may have been corrupt or incompetent — but these characters present a problem which any legal system is bound to address. Weisberg laments that “the tender refinements of advanced culture would give way, in the late nineteenth and twentieth centuries, to mass injustice against that culture’s least powerful and least verbal segments” (p. 13). Of course that is true. In fact, it is *definitionally* true: to suffer injustice is a form of powerlessness. Apparently Meursault murdered by a court is a victim; but an Arab murdered by Meursault is not.⁶⁸

The strengths and weaknesses of Weisberg’s approach stand out in sharp relief when he tries to tie things together, in his own fable about the German occupation of France during World War II. His point is that European “culture” proved unable to cope with the onslaught of Nazism. In his own words: “In the Europe of 1942, *The Stranger’s* Europe, institutions of intellect and culture were flocking to the Nazi cause. Our brief look at French law books of the period hinted at the extent to which the formally complex methods of European legalism contributed to Nazi oppression.”⁶⁹

This is gibberish. By 1942, the flower of European culture was in exile, on the run, in prison, or dead. The shells of the old institutions may have remained in place (particularly in France), populated by time-servers and epigones, but institutions of intellect and culture are not assembled out of fascist medals. Similarly with the law: lawyers were fascists, alright, and fascists were lawyers. But Weisberg offers no reason at all to suppose that lawyers were any more susceptible to fascist beguilement than any other section of the populace.

Weisberg tries to tie his story with an anecdote out of the occupation period. He tells of one Joseph Haennig who, during the occupation of France, published “a learned treatise on the definition of a

The Meursault we know does not deserve to die. He is not the monster uncovered by the artistic and value-laden criminal procedure. Furthermore, we know that the sun and some drinks (the former incomprehensible to a “reasonable man,” the latter never discovered by the inquisitor or at trial) did affect Meursault that day on the beach to an extent negating a supreme level of criminal responsibility for the act.

Weisberg, *Comparative Law in Comparative Literature: The Figure of the “Examining Magistrate” in Dostoevski and Camus*, 29 RUTGERS L. REV. 237, 258 (1976). That is certainly better, if not completely acceptable.

68. Weisberg makes a half-hearted effort to say that the crimes of the victims are the fault of the oppressor. “When the ‘nonlawyers’ under their influence try to lead independent and harmonious lives, these resentful verbalizers bring their victims back under sway, perhaps even inspiring them to perpetrate physical violence upon themselves or others.” P. 8. This is a simplistic, but not a trivial, proposition. Weisberg doesn’t pursue it very far.

69. P. 114. See also Weisberg, *Avoiding Central Realities: Narrative Terror and the Failure of French Culture Under the Occupation*, 5 HUM. RTS. Q. 151, 161-66 (1983).

Jew.”⁷⁰ As Weisberg recounts, “Haennig skillfully argued that the burden of proof of Jewishness should rest with the state in the equivocal case of an individual with only two Jewish grandparents” (p. 1). Haennig “was clearly not a villain” (p. 1). But he “used his lawyerlike talents not to challenge the existence of (the racial) laws but rather to have them ‘humanely’ interpreted” (p. 1). Or as Weisberg explains: “[I]n Joseph Haennig’s avoidance of central realities, in his willingness to create language in the service of a legal superstructure that he knew had just swept thousands of Frenchmen into the camps, he exhibited the same fatal evasiveness that marked the larger culture and its main institutions” (p. 1). This piece of “evasiveness,” Weisberg argues, “renders problematic the everyday rhetoric of his profession” (p. 3).

What can we make of this? It seems to me that Weisberg’s analysis harbors three problems. First, it is not at all clear that Haennig “did wrong.” But on the record as given, I don’t know how I can be expected to judge. It is important to stress, I think, that Weisberg himself tends to waffle on the point. He says that Haennig was “clearly not a villain”; his worst crime, evidently, was to be “problematic.” But “problematic” is not the same thing as “fatal evasiveness,” as “avoidance of the central realities.” The very meaning of “problematic” is that we aren’t clear: Haennig’s “legalism” may have been a moral evasion; or it may have been a deft piece of institutional tai chi. I don’t know anything at all about Haennig except what I read here: I don’t know what brought him to this unhappy juncture or what became of him later. More important, I haven’t any idea what his options were at the moment. But to put it in the simplest terms: if he saved more Jews by his “legalism” than he would have, say, by going underground in the Resistance, then I think he deserves better than he gets from Weisberg.

Second, even if Haennig did wrong, still the case provides no warrant at all for the conclusion that “wordiness” leads to vice. To understand this point, it might be useful to compare Weisberg’s account of Haennig with another study of Vichy life that offers an instructive parallel to Weisberg’s. I have in mind Philip Hallie’s *Lest Innocent Blood Be Shed*,⁷¹ a moving account of the career of André Trocmé, an obscure French pastor who inspired his townspeople, at considerable personal risk, to conceal thousands of Jewish refugees from the Nazis. Trocmé was, as I say, a pastor, not a lawyer, but that can hardly destroy the comparison: Weisberg gives ample evidence that his expansive view of “legalism” is broad enough to encompass religion.⁷² And

70. P. 1. Apparently he means to denote the document reprinted in his appendix. See pp. 181-182. But that is not a “learned treatise”; only a two-page memorandum.

71. P. HALLIE, *LEST INNOCENT BLOOD BE SHED* (1979).

72. Indeed, Weisberg’s hostility to religion, or more particularly Christianity, is so sharp that one is tempted at times to suspect that it is theology and not legalism that is the villain of the piece. See pp. 14-18, 66-70, 172-76 and *passim*.

while it is not "literary criticism," Hallie's account fits neatly into the same *genre* as Weisberg's as a kind of moral philosophy: an effort to reason about behavior from a particular case. One of the numerous virtues of Hallie's study is that he resists the impulse to draw quick-fix generalizations from a single extraordinary case. But that is the point: moral instances are instructive, even if they are not quick fixes.⁷³

Finally, even if Haennig did wrong, and even if he is typical of lawyers, still it does not follow that the wordless are by nature any purer than the wordy.⁷⁴ There is no doubt that the letter may kill, and often does. But it does not follow that the spirit always and necessarily giveth life. Weisberg displays an exemplary sympathy for the inarticulate victim. He might have saved some insight for the inarticulate thug. I'm sure that invincible innocence has done quite as much harm in the world as sophistication ever thought of doing. The point would be that doing good is a tricky business. One is lucky enough to have the chance. One had better be alert to take it when it comes.

Taking all this into account, however, there can be no doubt that Weisberg, either intentionally or otherwise, has helped to throw light on some issues that are central to this new vogue for "literary studies" and the law. Let me close by naming just a few of the most important.

First, these studies insist upon the centrality of the person as a morally autonomous agent. Studies of this sort are, in the last analysis, a kind of gossip, with all the virtues that the term implies: they analyze and evaluate behavior. Raskolnikov, Meursault, Billy Budd: Are they heroes or victims? Did they deserve to live, or to die? By talking about their choices, we concede the importance of choice. We recognize that a person in the final analysis makes his own choices: helped or hindered by the world around him, the choices are still his own.

At the same time, by focusing on persons in particular, these studies compel us to think of persons in relation to other persons. This is a point of critical importance: it requires us to think of persons in terms of their community, their past and their future, their network of assertions and loyalties. Weisberg doesn't stress the point (indeed, he might dispute it), but this perspective is, in a particular sense of the term, a "conservative" approach to morals. The conservatism in point here is not the radical libertarianism which so often passes for conservatism in the United States. It is, rather, the "traditionalist" conservatism, built on notions of community and culture. The avatar in American

73. Hallie, in discussing his own teaching, has suggested an interesting, if somewhat disreputable, possible reason for the renewed popularity of studies of this sort: entertainment. Discussing his students, he says: "They respond to plot, to narrative, to literature. Ethics becomes a catharsis [sic] and an excitement." Campbell, *Campus Scenes: Students Still See the Light at End of Liberal Arts Tunnel*, N.Y. Times, Nov. 16, 1986, at 52, col. 1 (natl. ed.).

74. This point is developed at considerable length by Henzelman & Levinson, *supra* note 29.

life is, of course, de Tocqueville.⁷⁵ This perspective does not in the least way deny the centrality of choice, or the moral autonomy of the chooser. Quite the contrary: it argues that the only way a person can make these autonomous choices effectively is with the nurture of a rich traditional life. The question is not just: what should *a* person do? Rather, it is: what should *this* person do, given his past, his present, his loyalties, his sense of himself?⁷⁶

Third, and perhaps most dramatic, this approach calls into question the very idea of rules, of law, of "legalism" as conventionally defined.⁷⁷ To put the case against legalism in a few vulgar oversimplifications: you can pay attention to laws or men. Human affairs are too subtle for anything as crude as law, which is at best a blunt instrument. If you are a good man, you don't need the law. If you are a bad man, you can manipulate it to your own advantage, so where is the point? Or in a more benign tone: life is a work of art — the trick is not "knowing how to follow the rule," but "knowing how to go on."⁷⁸

This is heady, explosive stuff. At the very least, the perspective serves to establish a tension between the idea of choice and the idea of law, with law decidedly on the defensive.⁷⁹ It is a virtue of Weisberg's work that he helps to throw light on the implications, even if only episodically and at times inadvertently. Similarly, I think his insights help us to "situate" this new perspective, and to get a sense of just how novel it really is, in terms of the warring jurisprudential sects. For it is clear that this approach can be distinguished from just about every important tendency in legal theory extant today. "Mainstream" jurisprudence may be rich in abstract systemization,⁸⁰ but it offers very

75. The inevitable citation here is A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835-1840). On the Tocquevillian tradition in general, see particularly R. KIRK, *THE CONSERVATIVE MIND* (7th ed. 1986). The idea of tradition as nurturing choice seems to me to be even more pervasive than one may at first blush recognize. For example, it seems to me central to the work of Polanyi and Kuhn in the philosophy of science. See, e.g., M. POLANYI, *PERSONAL KNOWLEDGE* (1962); T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970). For an exemplar among literary studies, see S. LETWIN, *THE GENTLEMAN IN TROLLOPE: INDIVIDUALITY AND MORAL CONDUCT* (1982); cf. C. LANSBURY, *THE REASONABLE MAN: TROLLOPE'S LEGAL FICTION* (1981). The tradition of "tradition" is, of course, itself problematic: compare E. SHILS, *TRADITION* (1981), with *THE INVENTION OF TRADITION* (E. Hobsbawm & T. Ranger eds. 1983).

76. See generally Pincoffs, *Quandary Ethics*, 80 MIND 552 (1971), reprinted in REVISIONS (S. Hauerwas & A. MacIntyre eds. 1983), at 92.

77. "What is legalism? It is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." J. SHKLAR, *LEGALISM* 1 (1964).

78. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 139-242. See generally WITTGENSTEIN: *TO FOLLOW A RULE* (S. Holtzman & C. Leich eds. 1981).

79. For a somewhat similar point, see MacIntyre, *Moral Philosophy: What Next?*, in REVISIONS, *supra* note 76, at 1, 14-15.

80. The conventional pantheon of modern classics would include J. RAWLS, *A THEORY OF JUSTICE* (1971); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); R. NOZICK, *ANARCHY*,

little on the notion of what it means for a person to be good. "Law and economics" offers — indeed it depends upon — a model of individual choice, but it is a model that is, although allegedly rigorous, surely abstract, and ultimately barren.⁸¹ "Left" legal studies, by contrast, avoid these vices of abstraction: indeed, they have done most of their best work in cocking a snook at abstraction and exposing its unstable premises.⁸² They have been far less successful at developing anything like an adequate notion of what it is to be a person, or of the problem of autonomous choice.

There are some obvious difficulties here. For one, works like Weisberg's pass under the label of "criticism" as distinct from critical *theory*.⁸³ And critics, unblessed with theory, have a tough time getting a place at the academic high table. Aside from works that bear the pretensions of *theory*, the critics generally have to occupy a place at the back of the hall somewhere between the astrologers and the phrenologists. Setting aside the possibility of conventional prejudice, there are good reasons for this reserve: absent a good, sound, articulated theory, how are we to comprehend particular examples? But this doesn't mean that there is any more bad criticism than bad science: only that it is harder to get rid of.⁸⁴ It brings to mind the too often retold story of the fellow looking under the streetlight for his lost watch — not because he lost it there, but because that was where the light was good. The difficulties of evaluating criticism don't relieve us of the responsibility. Quite the contrary: they put us on our mettle.

I am not quite sure just where this gets one. At best, I am in the business of trend-spotting. But a trend is not the same thing as a "school." I think there are fundamental and essential similarities among the likes of White, Shaffer, Lopez, West, and Weisberg, and that taken together their studies constitute an important and hitherto

STATE AND UTOPIA (1974). One may derive some sense of the distance to be traveled by examining the bibliography of Professor Lyons' recent study, D. LYONS, *ETHICS AND THE RULE OF LAW* (1984). It is an extensive summary of the literature on law and morals; yet it refers to none of the material that is central to this essay.

81. A "citation" to the literature of law and economics cannot be anything but arbitrary. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); *The Place of Economics in Legal Education*, 33 J. LEGAL EDUC. 183 (1983). A critique of Posner that anticipates more recent "literary" criticism is Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

82. R. UNGER, *KNOWLEDGE & POLITICS* (1975); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982). There is an excellent critique of Unger's radical communitarianism in Teachout, *Worlds Beyond Theory: Toward the Expression of an Integrative Ethic for Self and Culture*, 83 MICH. L. REV. 849, 883-90 (1985).

83. Is it possible to identify a single important critic since the generation of Lionel Trilling who achieved real respectability without staking out a "theoretical" position of some sort? Possibly, but the claimants are few and doubtful.

84. And maybe not even that. Bad science supported by ersatz but plausible theory can have a long shelf-life and great eminence. For an examination of the boundary between science and criticism, see R. NISBET, *SOCIOLOGY AS AN ART FORM* (1976).

unarticulated agenda. This is interesting and, I think, worth noting. It may, however, be insufficient to link them into a common dialogue. And that may be a blessing: it is very easy for a common dialogue to be transmogrified into a vulgar sect. It may well be that this sort of work is inherently resistant to such sectarianism. In any event, Weisberg deserves the reader's gratitude for his ambition and his imagination in furthering this work.